BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROXANN K. DUPRE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,362
HOBBY LOBBY	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the April 18, 2008 preliminary hearing Order of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was denied benefits after the ALJ determined that claimant "failed to establish that she is in need of additional treatment or is temporarily totally disabled as a result of the September 26, 2007 work-related incident."[1]

Claimant appeared by her attorney, Kelly W. Johnston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, D'Ambra M. Howard of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held February 20, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

At the preliminary hearing in this matter, respondent denied that claimant had suffered an accidental injury on September 26, 2007, and denied that the alleged injury arose out of and in the course of her employment with respondent. However, the incident

[1] ALJ's Order (Apr.18, 2008) at 1.

described by claimant as occurring on September 26, 2007, when she backed into a 4-wheeler, is, for the most part, uncontradicted. The more problematic issue deals with the intervening injury which claimant admits occurred at her home the following Sunday when she bent to pick up a potato from the kitchen floor and felt and heard a pop in her low back. Respondent, in its brief to the Board, argues this event constitutes an intervening injury and any need for medical treatment at this time is the result of the personal injury at home rather than the event at respondent's store on September 26, 2007, with the 4-wheeler. Claimant's Application For Board Review lists compensability as the only issue in dispute.

1. Did claimant suffer an accidental injury on September 26, 2007, which arose out of and in the course of her employment with respondent?

2. If claimant did suffer a work-related injury on September 26, 2007, did claimant suffer an intervening injury on September 30, 2007, in her kitchen at home sufficient to eliminate respondent's liability for workers compensation benefits?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, an assistant manager in respondent's Art and Hobbies Department, was stocking the shelves in respondent's store on Wednesday, September 26, 2007, using a 4-wheeler with a flat bed on which items for the store were stocked. Claimant testified the cart was only about one-third full. Claimant was putting a vase, weighing 10 to 15 pounds, on a shelf when she lost her balance and fell backwards, striking her low back on the handle bars of the 4-wheeler. Claimant suffered immediate pain. This incident was witnessed by claimant's co-worker, Claudia Arnold.[2] Claimant immediately told Ed Lee, her store manager, of the incident, but did not fill out an accident report and did not request or seek medical treatment. Claimant completed her work that day. Claimant then worked 5 hours of an 8-hour shift the next day (Thursday, September 27, 2007), and she worked 3 hours on Friday, September 28, 2007. Claimant testified that her back continued to hurt during this time.

On Sunday, September 30, 2007, while working in her kitchen, claimant dropped a potato. When she bent to pick up the potato, she felt and heard a pop in her low back.

[2] P.H. Trans. at 10.

The incident was so severe that claimant was unable to straighten up for 5 to 10 minutes.[3] Claimant began experiencing severe pain in her low back with pain into her hips and radiating pain into her legs, with the left being worse than the right.[4] The next day, Monday, claimant went to work and advised Mr. Lee that she was going to seek medical treatment with her chiropractor, Terry A. Eisenhauer, D.C. In the initial Patient Intake Form from Dr. Eisenhauer's office, claimant, in response to the question of how the problem began, wrote "I bent over to pick something up from floor".[5] There is no mention of an incident at work with a 4-wheeler. Claimant continued with Dr. Eisenhauer for five more treatments, with little relief. There is no mention of a 4-wheeler incident in any of Dr. Eisenhauer's notes.

Claimant next sought treatment with her primary care physician, Kevin D. Norris, M.D. Dr. Norris first examined claimant on October 30, 2007, at which time claimant reported back pain of 3 weeks duration which began when she "was working in the kitchen and dropped a potato. When she bent down to pick it up, there was a pop in her low back".[6] There is no mention of an incident at work with a 4-wheeler. Claimant was next examined by Dr. Norris on December 14, 2007, at which time the potato incident was again placed in the office notes. Again, there is no mention of a 4-wheeler incident at work.

On December 13, 2007, claimant was examined at Occupational Health Partners LLC. The office note of that date contains an entry stating,

> Patient comes in today stating on 09-26-2007 she hit her back on a 4-wheeler handle. She states she backed into it, slipped and then it hit her in the lower back. She scraped her back but had really no problem until 3 days later when she went to bend over to pick up a potato off the floor of her kitchen and had a pop in her back and had increasing pain since then."[7]

Claimant has been treated by several health care providers, undergoing x-rays and MRIs, and has been referred to physical therapy on more than one occasion. At the preliminary hearing, the ALJ noted the confusion with the two incidents. He determined

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[3] *Id*. at 35-36.

[4] *Id*., Cl. Ex. 4 (office note of Kevin D. Norris, M.D., dated October 3, 2007).

[5] *Id*., Cl. Ex. 4 (Patient Intake Form dated October 1, 2007.)

[6] *Id*., Cl. Ex. 4.

[7] *Id*., Cl. Ex. 4.

that a referral to Paul S. Stein, M.D., for an independent medical examination was the appropriate procedure.

Claimant was examined by Dr. Stein on April 1, 2008. Dr. Stein was told of the 4-wheeler incident and the doctor was told that claimant bent over at home and could not straighten up. He was also told that after the incident at home, claimant experienced burning, numbness and tingling from the right hip down the right lower extremity. Dr. Stein was also told claimant was experiencing "severe back pain after the incident at work and, particularly, the day before she bent over to pick up the potato at home".[8] He noted in his report that if claimant was experiencing severe pain before the potato incident, then claimant's present symptomatology would be related to the work incident. If there was no significant symptomatology prior to the incident at home, then the work incident would be seen as not a major contributor.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident

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[8] Dr. Stein's April 1, 2008 report at 5.

[9] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2007 Supp. 44-501(a).

> occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[13]

Claimant argues for a determination that the incident on September 26, 2007, with the 4-wheeler was most significant in her need for ongoing treatment. Yet the medical notes contemporaneous with that incident fail even to note the incident. Instead, the medical notes of Dr. Eisenhauer and Dr. Norris discuss the potato incident, but fail to mention the incident at work. Additionally, after the work incident, claimant did not seek medical treatment and continued to work, although somewhat limited. It was only after the incident in claimant's kitchen with the potato that claimant sought medical treatment.

This record does not support claimant's contention that she is in need of medical care resulting from the 4-wheeler incident at work. Instead, the evidence points more to the home injury as being the cause of claimant's ongoing problems and need for surgery.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to carry her burden of proof in establishing that her current need for medical treatment stems from the work-related incident on September 26, 2007. Instead, this record supports a finding that claimant's need for ongoing medical care stems

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[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[14] K.S.A. 44-534a.

from the incident at home when claimant bent over to pick up a potato in claimant's kitchen.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 18, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2008.

HONORABLE GARY M. KORTE

c: Kelly W. Johnston, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge